Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM SHANER, et al.,

Petitioners,

v.

JEFFERY BROWN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, in an action brought under 42 U.S.C. § 1983, a change in the capacity of a correctly identified defendant, from "official" to "individual," via amended complaint filed *after* the expiration of the statute of limitations, "changes the party or the naming of the party against whom a claim is asserted . . . " so as to mandate compliance with F.R.Civ.P. 15(c)(3) and eliminate F.R.Civ.P. 15(c)(2) as an *independent* basis for relation back? If so,

a. can such a defendant, who, prior to the capacity change, never treated the action as anything other than an "official" capacity lawsuit, be said to have "received such notice of . . . the action that . . . [he] . . . will not be prejudiced in maintaining a defense on the merits . . . " as required by F.R.Civ.P. 15(c)(3)(A)?

b. can a plaintiff's continuously steadfast refusal to name such a defendant in his "individual" capacity after notice, and court invitation to do so within the statute of limitations, constitute a "mistake" as contemplated by F.R.Civ.P. 15(c)(3)(B)? If so,

    1) where the correct full name of the defendant has always been used, is it a "mistake concerning the *identity* of the proper party . . . " as required by F.R.Civ.P. 15(c)(3)(B)?

LIST OF ALL PARTIES

William Shaner, William Goodlet and the City of Toledo were the Appellees in the proceeding below.

Before this Court, Officers Shaner and Goodlet are the only Petitioners.[1]

The Appellants below were Jeffery Brown, his wife, Lynette Brown, and her three minor children, Kevin Johnson, Keith Johnson and Crystal Reid. They are also the Respondents herein.

No corporate party is involved in this Petition.

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[1] The court of appeals affirmed the district court's judgment in favor of the City of Toledo. Review is sought herein only for the appellate court's reversal of the district court's judgment in favor of the police officers.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, William Shaner and William Goodlet, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 15, 1999.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-16) is reported at 172 F.3d 927.

The opinions of the district court (App. 18-25, 26-37 and 38-41) are unreported.

JURISDICTION

The court of appeals entered its judgment (App. 17) on April 15, 1999. Its order denying Petitioners' Petition for Rehearing *En Banc* (App. 42-43) was issued on June 7, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 42 U.S.C. § 1983 (App. 44).

and

2. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

The pertinent portion of Rule 15(c) provides:

* * *

> **(c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

* * *

STATEMENT OF THE CASE

On March 11, 1995, Respondent, Jeffery Brown, hereinafter "Brown," was arrested at his residence pursuant

to six outstanding arrest warrants. His wife and her three minor children were present at the time of the arrest.

On April 10, 1996, as a result of this arrest, Respondents filed a lawsuit in state court against the Petitioners herein. This lawsuit included state law claims for assault, battery and false arrest/imprisonment. It also purported to assert a claim under 42 U.S.C. § 1983 for the deprivation "of rights secured under the U.S. Constitution. . . . "

Officers Shaner and Goodlet were the only defendants named in this action. The capacity in which they were sued under § 1983 was not specified.[2]

Five days later, Respondents filed their First Amended Complaint. This pleading added the City of Toledo, hereinafter "City," as a defendant on a *state tort*

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[2] As noted by this Court in *Hafer v. Melo*, 502 U.S. 21, 24 n.* (1991), where a § 1983 complaint does not specify the capacity in which a government employee is sued, the Sixth Circuit holds that such an employee is deemed to have been sued in his or her official capacity only. The Eighth Circuit also follows this rule. Other circuits examine the course of the proceedings in the trial court to determine whether the lawsuit is an "official" or "individual" capacity action.

Although the Supreme Court has never issued a definitive ruling on this point, it is unnecessary to do so in this case for two reasons. First, the appellate court did not disturb the district court's determination that Petitioners were not sued in their *individual* capacities prior to expiration of the statute of limitations. Secondly, even if the "course of proceedings" approach were applied in this case, Shaner and Goodlet still could not be said to have been sued in their individual capacities because Respondents were repeatedly notified that the lawsuit was only an official capacity proceeding, and Petitioners have taken no action inconsistent with this position.

claim for negligence.[3] It also failed to specify whether the police officers were being sued under federal law in their individual or official capacities.

Petitioners removed this action to the district court pursuant to 28 U.S.C. § 1441. The district court's original jurisdiction was invoked under 28 U.S.C. § 1331, while its supplemental jurisdiction was grounded in 28 U.S.C. § 1367.

In their answer to the First Amended Complaint, Petitioners were collectively referred to as the "City," and no individual capacity defenses were asserted.

On May 21, 1996, Petitioners filed and served their removal statement. In it, they stated that "Shaner and Goodlet are not named in this action in their individual capacity (sic) and, therefore, this action is deemed to be one alleged against only the City of Toledo." This assertion was reiterated at the July 15, 1996 case management conference in the presence of the District Judge and Respondents' counsel. At that point, the District Judge extended an invitation to Respondents' counsel to amend the Complaint a second time. This invitation was declined.

On January 14, 1997, the Joint Concise Statement for *Voir Dire* was filed with the court. This statement was

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[3] Since the "official"/"individual" capacity dichotomy in federal civil rights actions is not applicable to Ohio tort claims, it was necessary for Respondents to actually name the City in order to pursue this negligence claim.

signed by counsel for all parties and addressed municipal liability only.[4]

On Friday, January 17, 1997, a jury was selected,[5] sworn, and released until the following Tuesday, when the presentation of opening statements was to commence. At this juncture, the only claims which remained for resolution were those brought pursuant to 42 U.S.C. § 1983.[6]

Shortly after jury impanelment, the City orally moved to dismiss the action pursuant to F.R.Civ.P. 12(b)(6). Essentially, the City contended that this was only an official capacity action and that Respondents alleged neither sufficient facts nor the legal elements necessary for the imposition of governmental liability under *Monell v. Dep't of Soc. Serv. of New York*, 436 U.S. 658 (1978) and its progeny.

On January 24, 1997, the district court granted the City's motion, but gave Respondents leave to file a second amended complaint.

On March 18, 1997, Respondents filed their Second Amended Complaint. In this action, Officers Shaner and Goodlet were named as defendants in their individual

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[4] Petitioners' trial brief also addressed only municipal liability and expressly stated that individual capacity claims were not present.

[5] Just prior to actual voir dire, the Joint Concise Statement for *Voir Dire* was read to the prospective jury by the U.S. Magistrate Judge.

[6] All state law claims were previously withdrawn or dismissed by stipulation.

capacities only and were alleged to have illegally entered and searched Plaintiffs' residence. They were also alleged to have arrested Brown without probable cause and with the use of excessive physical force. The City was separately named as a defendant in this action and was alleged to have maintained a policy and/or custom of inadequate police officer training. No state law claims were included in this latest Complaint.

Shaner and Goodlet moved to dismiss this Complaint arguing that Respondents claims were barred by the statute of limitations.[7] The City, on the other hand, asked for summary judgment on the basis that there was no evidence to suggest that the alleged civil rights violations were the result of any constitutionally infirm policy or custom.

The district court granted each of these motions. App. 36-37. With regard to the former motion, the court found that Shaner and Goodlet were not named as individual capacity defendants until March 18, 1997. App. 28. It also determined that Respondents failed to satisfy the "notice without prejudice" and "mistaken identity" requirements necessary to trigger the relation back of an amended pleading under applicable rules of civil procedure. App. 30-31. The court, therefore, concluded that Respondents' claims against Shaner and Goodlet were barred by the statute of limitations.

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[7] In the Sixth Circuit, the statute of limitations for a § 1983 claim is two years. *Hull v. Cuyahoga Valley Joint Voc. Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 510 (6th Cir. 1991).

Respondents' Motion for a New Trial was treated as a Motion to Alter or Amend Judgment under F.R.Civ.P. 59(e). App 39-40. It was denied on October 17, 1997. App. 41.

On appeal, the Sixth Circuit affirmed the district court's summary judgment ruling in favor of the City, but reversed the judgment favoring Shaner and Goodlet. App. 9, 16. That is, while specifically declining to decide whether a change in capacity "changes the party or the naming of a party against whom a claim is asserted," the court concluded that F.R.Civ.P. 15(c)(2) and (3) provided *simultaneous, independent* bases for the relation back of Respondents' Second Amended Complaint. App. 15-16.

The appellate court believed that since the conjunctions connecting the three parts of Rule 15(c) are "or," and the claims asserted in Respondents' Second Amended Complaint arose out of the same incident as set forth in the original pleading, Rule 15(c)(2) was available as an option for relation back regardless of whether the capacity change resulted in a party change. App. 11-12.

The circuit court went on to hold that relation back under Rule 15(c)(3) was *simultaneously* appropriate because 1) Respondents' failure to name Shaner and Goodlet in their individual capacities was an "oversight" and just a "temporary omission"[8]; 2) the alleged wrongdoing related to Shaner and Goodlet's personal conduct;

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[8] Under Rule 15(c)(3), a defendant must receive "notice without prejudice" within 120 days of the filing of the Complaint. In this case, the point at which Shaner and Goodlet knew that they were being sued in their individual capacities was March 18, 1997, i.e. more than eleven (11) months after the

3) Shaner and Goodlet were the only defendants named in Respondents' original Complaint, and 4) Shaner and Goodlet acknowledged, through counsel, that, as official capacity defendants, they were not potentially liable parties.[9] App. 12-15. On the basis of these conclusions, the court felt that the "mistaken identity"[10] and "notice without prejudice" requirements of Rule 15(c)(3) were met. App. 15-16.

REASONS FOR GRANTING THE PETITION

This case affords this Court an opportunity to: 1) reaffirm the significance and effect of the "individual" vs. "official" capacity dichotomy in § 1983 cases; 2) realign the Sixth Circuit's "party change" view in conformity with previous Supreme Court and other circuit court rulings, and 3) resolve the conflict among the various circuits regarding the meaning of the "mistaken identity" and "notice without prejudice" requirements of F.R.Civ.P. 15(c)(3).

The need for guidance on the several related and important "relation back" questions addressed herein is

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filing of Respondents' First Amended Complaint; more than seven (7) months after the expiration of the Rule 15(c)(3) notification requirement; and, seven (7) days after the expiration of the statute of limitations.

[9] On this last point, the appeals court seems to suggest that Shaner and Goodlet must, therefore, have been on notice of their potential liability as *individuals*.

[10] Shaner's and Goodlet's correct full names were used by Respondents in each of the three Complaints.

acute. The Sixth Circuit's opinion completely clouds the water through which § 1983 litigants must see in order to recognize those situations where relation back is authorized by F.R.Civ.P. 15(c)(2) *or* (c)(3). Given its full import, this decision invites *all* litigants, not only those pursuing damages under § 1983, to claim *simultaneous, independent* relation back entitlements under F.R.Civ.P. 15(c)(2) *and* (c)(3) by asserting an "oversight" or "omission" unrelated to a proper party's *identity* and regardless of whether the proposed amendment "changes the party or the naming of the party against whom a claim is asserted . . . . " It also tells government employees that whenever they are correctly identified by name in a § 1983 complaint, regardless of the capacity in which they are sued, they are on notice that they are potentially liable parties. Indeed, for all practical intents and purposes, this ruling eliminates the "individual" vs. "official" capacity dichotomy in § 1983 cases.

I. The Sixth Circuit's conclusion that F.R.Civ.P. 15(c)(2) and 15(c)(3) provide *simultaneous, independent* bases for relation back is in conflict with other circuit courts which have considered relation back in the context of a § 1983 capacity or party change.

Although the "or" conjunctions contained in F.R.Civ.P. 15(c) allow for the use of three distinct relation back options, these options cannot be exercised indiscriminately. Given the language of the rule, each choice is dependent upon the existence or non-existence of particular circumstances. Indeed, Rule 15(c)(2) can only apply as an *independent* basis for relation back where the proposed pleading amendment does not "change the party

or the naming of the party against whom a claim is asserted . . . . " Where such a change occurs, the requirements of Rule 15(c)(3) must be satisfied. As *independent* bases, Rules 15(c)(2) and (c)(3) are mutually exclusive. Neither law nor logic allows these rules to *simultaneously* provide *independent* bases for relation back.

Most other circuits use Rule 15(c) in accordance with this understanding. That is, although their rulings may not specifically renounce Rule 15(c)(2), they, nonetheless, consider and analyze the relation back question exclusively in the context of Rule 15(c)(3). *See, e.g., Eison v. McCoy*, 146 F.3d 468, 472 (7th Cir. 1998); *Atchinson v. District of Columbia*, 73 F.3d 418, 426-27 (D.C. Cir. 1996); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995); *Colvin v. McDougall*, 62 F.3d 1316, 1318 (11th Cir. 1995); *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir. 1995); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *Keller v. Prince George's County*, 923 F.2d 30, 33 (4th Cir. 1991); and *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102 (1st Cir. 1979).

In this regard, the Sixth Circuit's opinion manifests a clear and significant departure from the time-honored view that only one of these two relation back provisions can apply *independently* to a given set of circumstances, and that the correct application is dependent upon a resolution of the party change question.[11] The conclusion

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[11] Prior to the 1966 Amendment, Rule 15(c) contained only the language now included within Rule 15(c)(2). In order to accommodate those situations where a party change was sought, the 1966 Amendment added the language now contained in Rule 15(c)(3). Accordingly, if the language of Rule

that these provisions can *simultaneously* provide *independent* bases for relation back does not amount to a misapplication of a properly stated rule of law but, instead, represents a fundamentally incorrect statement of the law.

II. In the context of F.R.Civ.P. 15(c), questions such as 1) whether a § 1983 capacity change "changes the party," 2) whether the capacity change of a correctly identified defendant can be accomplished as a "mistake concerning identity," and 3) whether personal involvement in the incident underlying an official capacity lawsuit satisfies "notice without prejudice," are questions for which there is a conflict among the circuits and/or a conflict with certain basic capacity principles espoused by the Supreme Court. These important legal questions should, therefore, be settled by this Court.

An official capacity lawsuit is a suit against the government. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). It is not a suit against a named official personally. *Graham*, 473 U.S. at 166. Accordingly, an official capacity judgment against a government employee imposes liability only on the entity which the employee represents.[12] *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Graham*, 473 U.S. at 165-66.

15(c)(2) could serve as an *independent* basis for relation back in the context of a party change, there would have been no need to add the Rule 15(c)(3) "mistaken identity" and "notice without prejudice" language.

[12] The Sixth Circuit's previous rejection of this principle was rebuffed by this Court. *See Brandon*, 469 U.S. at 470 n.17, wherein the Supreme Court quoted a portion of the circuit court's order denying the petition for rehearing *en banc*, to wit:

With this concept in mind, it follows that, at a minimum, a § 1983 capacity change from "official" to "individual" constitutes a change in party, i.e. a change from the governmental entity to a human being.[13] With such a change, the relation back requirements of F.R.Civ.P. 15(c)(3) are triggered.

By refusing to decide the party change question, the Sixth Circuit has not only ignored the significance which the Supreme Court has attached to the "official"/"individual" capacity dichotomy in § 1983 actions but, as stated previously, has also adopted an approach different from that utilized in the other circuits. That is, in analyzing the relation back question solely in the context of Rule 15(c)(3), these other circuits have implicitly acknowledged that a change in party has occurred.

"We do not believe that a judgment for damages against a police official in his official capacity is the same as a judgment against the city itself."

[13] In the strictest analytical sense, a capacity change actually results in the "adding" of a party, a circumstance for which, given the language of Rule 15(c)(3), relation back does not appear to be authorized. Even this point is one on which the circuit courts appear to be divided. That is, some view Rule 15(c)(3) as the appropriate analytical vehicle for *adding* a party, *see, e.g., Jacobsen v. Osborne*, 133 F.3d 315, 319-20 (5th Cir. 1998); *Ayala Serrano v. Lebron Gonzalez*, 909 F.2d 8, 12-13 (1st Cir. 1990); and *Eakins v. Reed*, 710 F.2d 184, 187-88 (4th Cir. 1983), while others conclude that there is no such option. *See, e.g., Atchinson*, 73 F.3d at 426-27; *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 469-70 (2d Cir. 1995), *modified by* 74 F.3d 1366 (2d Cir. 1996); *Colvin*, 62 F.3d at 1318-19; and *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir. 1993) (*citing Wood v. Worachek*, 618 F.2d 1225, 1229 (7th Cir. 1980)).

While the Sixth Circuit appears to stand alone against the other circuits on the foregoing issues,[14] there appears to be a more balanced circuit split on the meaning of the "mistaken identity" requirement of Rule 15(c)(3)(B). Some circuits believe that mistakes in determining who should be sued, *Urrutia v. Harrisburg County Police Dep't*, 91 F.3d 451, 457-58 (3d Cir. 1996), and those resulting from a failure to appreciate the intricacies of constitutional tort law, *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 557 (7th Cir. 1996), are the kinds of mistakes contemplated. Other circuits feel that the rule requirement is strictly limited to mistakes regarding a defendant's personal identity. *See, e.g., Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir. 1998); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997); and *Cornwell*, 23 F.3d at 705. Under this view, where a plaintiff knows the true identity of a person involved in the claimed misconduct, a failure to timely include the person in the action as a potentially liable party cannot be characterized as an identification mistake. Even where the identity of a potential defendant is *unknown*, some circuits hold that the failure to timely name or substitute the involved defendant results from a lack of knowledge, or dereliction, rather than a *mistake*. Thus, relation back is not permitted. *See, e.g., Worthington*, 8 F.3d at 1256-57; *Baskin v. City of Des Plaines*, 138 F.3d 701, 704 (7th Cir. 1998) and *Barrow*, 66 F.3d at 469-70.

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[14] I.e., the *simultaneous, independent* applicability of Rules 15(c)(2) and (c)(3), and the absence of any need to decide the party change question.

In this case, the Sixth Circuit did not attempt to explain or justify Respondents' "oversight" or "omission."[15] Instead, the court simply concluded that the failure to timely include Shaner and Goodlet as potentially liable parties was a "mistake." No further explanation addressing the "identity" aspect of the requirement was given. To the extent the court's characterization was offered in satisfaction of the rule requirement, it conflicts with at least five other circuits which hold that where an involved person's identity is known, *Powers*, 148 F.3d at 1226-27; *Rendall-Speranza*, 107 F.3d at 918-19; *Cornwell*, 23 F.3d at 705; *Keller*, 923 F.2d at 34, or the plaintiff is advised by the court, *Barrow*, 66 F.3d at 469, or advised by the defendant, *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, 857-58 (9th Cir. 1986), that the intended defendant has not been made a potentially liable party, the failure to timely name or substitute the person does not constitute a "mistake concerning identity" under Rule 15(c)(3)(B).

The Sixth Circuit also concluded that the "notice without prejudice" requirement of Rule 15(c)(3)(B) was satisfied because Petitioners knew they were Defendants

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[15] It is clear, however, that the "oversight" did not result from Respondents' lack of knowledge regarding Shaner's and Goodlet's identities. Their correct full names have been used by Respondents since the inception of this lawsuit. Nor was it prompted by any misunderstanding regarding constitutional pleading requirements because Respondents were repeatedly advised of the limited nature of the action by the court, opposing counsel and through various pleadings. Moreover, the capacity issue was addressed in the City's Motion to Dismiss and, following dismissal, Respondents were given leave to name Petitioners in their individual capacities within the statute of limitations.

in a § 1983 lawsuit; the alleged wrongdoing related to their personal conduct; and, having conceded non-liability as "official" capacity Defendants, Petitioners must have been aware of their potential liability as *individuals*. In essence, the court has held that an official capacity lawsuit, which names a government employee as a defendant, serves as sufficient notice to the employee that his personal assets are at risk, even where there is no attempt to impose personal liability on the employee until after the expiration of the statute of limitations.

This aspect of the court's ruling conflicts with other circuit opinions which hold that a person's awareness of a lawsuit, even one based on such person's own conduct or involvement, is not sufficient to satisfy the Rule 15(c)(3)(B) notice without prejudice requirement. *See Colvin*, 62 F.3d at 1318; *Keller*, 923 F.2d at 33-34; *Wood*, 618 F.2d at 1229-30. It also flies in the face of those Supreme Court rulings which confirm that simply naming a person as a defendant in a § 1983 lawsuit is not enough to expose him to personal or individual liability. *Will*, 491 U.S. at 71; *Graham*, 473 U.S. at 165-66. As potential liability concepts, "official" and "individual" capacity designations are separate and distinct. The Supreme Court has repeatedly emphasized this distinction due to marked differences in liability standards, available defenses and immunities, and the type of damages recoverable. *Brandon*, 469 U.S. at 472-73; *Graham*, 473 U.S. at 165-67; *Hafer*, 502 U.S. at 25-26. If this distinction is to retain any significance at all, an official capacity lawsuit cannot be said to be one that sufficiently alerts named officials that they may be *personally* accountable for the damages claimed.

Furthermore, other circuits have found prejudice inherent where no individual capacity defenses are raised and where the defendant would, otherwise, be deprived of a statute of limitations defense. *Colvin*, 62 F.3d at 1318-19 (holding that a suit could not be converted from official to individual capacity due to legal and monetary prejudice to sheriff individually); *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1073-74 (7th Cir. 1989) (stating that for Rule 15(c) to apply, the party must receive actual notice within the limitations period, because, otherwise, it would unfairly prejudice the party's defense on the merits); *Lojuk v. Johnson*, 853 F.2d 560, 562-63 (7th Cir. 1988) (finding that relation back was not permitted to add an employee who would be deprived of statute of limitations defense, since there was not a clearer indication from Congress or the drafters of the Civil Rules to wipe out a statute of limitations defense under Rule 15(c)). Since no individual capacity defenses have been asserted in this action, and Petitioners have been deprived of their statute of limitations defense, the Sixth Circuit's opinion also conflicts with these rulings.

III. By relying on factual and legal conclusions which have no support in the undisputed record, by ignoring certain specific aspects of the relation back requirement, and by rendering an opinion which directly conflicts with, but does not overrule, its own precedent, the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The circuit court has abandoned *stare decisis* and trivialized the kinds of factual and legal distinctions that

legal scholars have customarily relied upon to separate otherwise similar cases. Indeed, the court's analysis cannot be squared with fundamental notions of jurisprudence. By exposing the incomplete and unjustifiable course taken by the circuit court in reaching its opinion, Petitioners trust that the need for Supreme Court intervention will be apparent.

Prior to the ruling below, it was the Sixth Circuit's position that where a plaintiff amends his Complaint, after the expiration of the statute of limitations, to change the capacity in which a correctly identified § 1983 defendant is sued from "official" to "individual," the amendment does *not* relate back under F.R.Civ.P. 15(c)(3). *Lovelace v. O'Hara*, 985 F.2d 847, 850-51 (6th Cir. 1993). The reasoning behind this rule is that a § 1983 capacity change concerns a matter of law, as opposed to a mistake relating to identity and, due to the divergent standards of proof, available defenses, and legal arguments, prejudice is inherent. *Id.* In fact, strict adherence to the mistaken identity requirement has been a hallmark of the Sixth Circuit's treatment of relation back questions under F.R.Civ.P. 15(c)(3). *See Collyer v. Darling*, 98 F.3d 211 (6th Cir. 1996); *Cox v. Treadway*, 75 F.3d 230 (6th Cir. 1996).

It is, undeniably, an appellate court's prerogative to set a new path for the law in its own circuit. However, where the new standard conflicts with one or more clear prior principles, the old law must be overruled. Otherwise, there are no clear guideposts upon which to rely. Without overruling its own precedent, the court has set a different and, thus, inconsistent course for the law.

Officers Shaner and Goodlet relied on the law that was handed down prior to the ruling in this case. From this, they understood that they were named as defendants in their official capacities only and, therefore, had no potential personal liability.[16] They have taken no action inconsistent with this understanding. When Respondents amended their Complaint after the expiration of the statute of limitations, Petitioners, whose correct full names were used from the outset, also knew that, without prior notice of potential personal liability *and* some mistake relating to their *identity*, they could not be made to answer for damages. Although these were, *and still are*, the rules which govern personal liability exposure under § 1983 in the Sixth Circuit, the court refused to afford Petitioners these protections. Unfortunately, this was done on the basis of claimed factual and legal distinctions, which do not exist under any reasonable and fair comparison of *Lovelace* and the present case.

To illustrate, the circuit court determined that Respondents' failure to specify capacity was a "mistake." The *uncontradicted* record, on the other hand, shows that it was either a particular strategic choice or the result of a lack of diligence.[17] Furthermore, although F.R.Civ.P. 15(c)(3) mandates that the mistake be one concerning *identity*, the court made no attempt to address this point or to try to distinguish its own precedent, which holds that mistakes in pleading capacity are mistakes of law not

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[16] *See Wells v. Brown*, 891 F.2d 591, 592-93 (6th Cir. 1989).

[17] I.e. a refusal to amend within the statute of limitations after being invited by the court to do so, and a later failure to amend after being given formal leave to do so.

identity. *Lovelace*, 985 F.2d at 851. The "temporary omission" characterization is another example of the court's unwillingness to acknowledge the uncontradicted record, which shows an eleven month interval.[18]

While the circuit court did attempt to justify its conclusion regarding notice, albeit in a manner inconsistent with previous Supreme Court capacity dichotomy pronouncements, there was no explanation given for its conclusion that Petitioners have not been prejudiced in maintaining a defense on the merits. Here, again, the court made no attempt to distinguish this aspect of *Lovelace*, which found prejudice to be inherent in these situations.

In finding *Lovelace* not controlling, the appellate court seems to suggest that the ultimate "mistake" question (mistake of law vs. mistake of identity) and the prejudice question (inherent or not inherent) are different simply because, in this case, official capacity resulted from an unspecified complaint, while in *Lovelace*, it was the product of a specific designation. If this factual distinction has no legal effect on the capacity question,[19] it cannot change the complexion of the mistake and prejudice questions.

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[18] *See* footnote 8 herein.

[19] It had no such effect because the circuit court did not overrule *Wells v. Brown* and its progeny, nor did it rule that Petitioners, consequently, had been named in their individual capacities all along. Indeed, there are no degrees of "official" capacity such that some lesser degree translates into "individual" capacity.

In short, the court ignored those aspects of its own precedent that could not be properly distinguished. Where such precedent was acknowledged, the court relied on hollow distinctions and conclusions which are unsupported by the undisputed record. In the process, Petitioners have been denied the protection and benefit of the law on which they relied, and which remains in effect.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve existing circuit conflicts on the several important relation back questions addressed herein under F.R.Civ.P. 15(c). The Writ is also necessary to realign the Sixth Circuit's relation back analysis in conformity with commonly accepted standards of federal jurisprudence.

Respectfully submitted,

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Jeffery BROWN; Lynette Brown; Kevin Johnson; Keith Johnson; Crystal Reid, by and through their mother and next friend Lynette Brown, Plaintiffs-Appellants,

v.

William SHANER; William Goodlet; City of Toledo, Defendants-Appellees.

No. 97-4406.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 26, 1999.

Decided April 15, 1999.

Alan W. Penamon (argued and briefed), Toledo, Ohio, for Plaintiffs-Appellants.

Samuel J. Nugent (argued and briefed), Office of the City of Toledo, Law Department, Toledo, Ohio, for Defendants-Appellees.

Before: MERRITT and MOORE, Circuit Judges; DUGGAN, District Judge.*

MERRITT, Circuit Judge.

On March 11, 1995, defendants William Shaner and William Goodlet of the Toledo, Ohio, Police Department went to the residence of plaintiff Jeffery Brown to arrest him pursuant to six outstanding arrest warrants. Both officers were in uniform and were conspicuously identified as Toledo police officers. When they arrived, both

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

Brown and his wife Lynette were asleep in their bedroom. Her children (from two previous marriages) were awake and inside the house. The officers instructed one of the children that they wanted to see the plaintiff, and the message was quickly relayed to Mr. and Mrs. Brown. The inside door to the house was open, but the outer screen door remained closed.

Mr. Brown came to the door and spoke to the officers through the screen door, which was now slightly ajar; he did not let the officers into his home. When the officers asked Mr. Brown to come outside so that they could speak to him, he responded that he wished first to get dressed, as he was inappropriately attired, having just been stirred from his bed. He then shut both doors and went to put on clothes. Shortly thereafter, the police officers began pounding loudly on the door and yelling racial epithets, thereby frightening the children. The officers proceeded to enter the house and apprehend Mr. Brown, further abusing him verbally, assaulting him physically, and threatening his life. Ultimately, they placed Brown in handcuffs and transported him to the county jail.

Plaintiffs filed a Complaint with the Toledo Police Division Internal Affairs Unit, which resulted in an investigation leading to a determination that the allegations against defendants Shaner and Goodlet were "unfounded." On April 10, 1996, plaintiffs filed their original Complaint in the Lucas County (Ohio) Court of Common Pleas, purporting to assert claims of assault, battery, false arrest/imprisonment and the deprivation of constitutional rights under 42 U.S.C. § 1983. Officers Shaner and Goodlet were the only defendants named in

this pleading. The capacity in which they were sued under § 1983 was not specified.

On April 15, 1996, plaintiffs filed an Amended Complaint in state court, naming the City of Toledo as an additional defendant and raising a state tort claim for negligence due to the City's alleged failure to train and supervise Shaner and Goodlet. The Amended Complaint too failed to state whether the officers were being sued under federal law in their individual or official capacities. The action was then removed to the U.S. District Court for the Northern District of Ohio. In their removal statement, the defendants wrote that the officers were "not named in this action in their individual capacities and, therefore, this action is deemed to be one alleged against only the City of Toledo."

On July 15, 1996, District Judge James Carr conducted a case management conference at which the defendants' counsel stated that the defendants had not been named in this action in their individual capacities and that the action was essentially one exclusively against the City of Toledo. Judge Carr thus extended an invitation to plaintiffs' counsel to amend the Complaint again, which invitation was declined.

Prior to jury impanelment, counsel were informed that District Judge John Potter would preside at trial due to Judge Carr's unavailability. On January 17, 1997, after voir dire, defendants presented an oral Motion to Dismiss based on the sufficiency of plaintiff's Amended Complaint to state a cause of action pursuant to § 1983. The trial court granted defendants' motion, finding (1) that the Amended Complaint did not specify claims against

the officers in their individual capacities with sufficient clarity, and (2) that the only defendant in the action was the City of Toledo. Nonetheless, the court again extended plaintiffs a second opportunity to amend their complaint on or before March 21, 1997.

On March 18, 1997, plaintiffs filed their Second Amended Complaint, finally naming defendants Shaner and Goodlet in their individual capacities and alleging that they illegally entered and searched his residence. Plaintiffs also contended that the defendants arrested Mr. Brown without probable cause and through the use of excessive physical force. The City was also named as a defendant, and was alleged both to have maintained a policy and/or custom of inadequate police officer training and to have ratified the constitutional deprivations through its failure to punish the officers for their conduct in this incident.

On April 8, 1997, defendants filed a Rule 12(b)(6) Motion to Dismiss, arguing that plaintiffs' claims were barred by the applicable 2-year statute of limitations. Plaintiffs responded that the limitations statute was satisfied because their Second Amended Complaint related back to the date of the filing of their original Complaint. On May 20, 1997, the City of Toledo filed a Motion for Summary Judgment, asserting that there was no evidence to suggest that the alleged civil rights violations were the result of a departmental or city policy.

On June 23, 1997, the district court granted each of these motions, dismissing plaintiffs' claims against the defendants and entering summary judgment against the plaintiffs with respect to their claims against the city.

With regard to the Motion to Dismiss, the district court ruled that the officers were not named as individual capacity defendants until March 18, 1997, after the 2-year statute of limitations had expired. As for the City's Motion for Summary Judgment, the district court held that Plaintiffs presented no evidence upon which a reasonable jury could find that the City of Toledo had maintained some policy or custom allowing unlawful dwelling entry or the use of excessive physical force during arrest.

This timely appeal ensued on November 12, 1997. First, Plaintiffs argue that the evidence they submitted in support of their contention that the City of Toledo had a policy of poorly training its officers was sufficient to withstand summary judgment. Second, they maintain that they did in fact state individual capacity claims prior to the expiration of the statute of limitations. Alternatively, they contend that such claims were timely insofar as they relate back to the filing of their original Complaint. For the following reasons, we affirm the district court's granting of the City's Motion for Summary Judgment, but reverse its decision to grant the Officers' Motion to Dismiss.

I. *Municipal Liability*

The instant matter requires this Court to address only the question whether plaintiffs' evidence in support of their contention that the City of Toledo had a policy of poorly training its officers was sufficient to withstand summary judgment. The Supreme Court enunciated the standards for adjudging government inaction in both *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85

L.Ed.2d 791 (1985), and *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), a case that arose out of this Circuit.

In *Tuttle*, an individual was shot and killed by a police officer. His family sued, claiming that the officer's excessive use of force was caused by a municipal policy of inadequate training of officers. The Supreme Court, in a plurality opinion by Justice Rehnquist, stated that the district court erred in its instructions to the jury, which allowed a finding that there was a policy of inadequate training on the basis of one incident:

> We think this inference unwarranted; first, in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning the state of mind of the municipal policymakers. But more importantly, the inference allows a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. . . . *Monell*'s "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one "bad apple."

471 U.S. at 820, 105 S.Ct. 2427 (citing *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611

(1978) (holding that cities are liable only for constitutional violations resulting from their official policies and customs)).

In *Canton*, the Supreme Court resolved the uncertainty as to the legal standard necessary to prove a policy based on government inaction and held that demonstrating a policy of inadequate training requires proof of deliberate indifference by the government. The plaintiff, Geraldine Harris, claimed to have been injured by the failure of the city to instruct police officers to recognize medical ailments and to summon treatment. When she was ill at the police station following her arrest, the officers did not provide or summon any medical assistance.

The Supreme Court rejected the municipality's contention that section 1983 liability can be imposed only where the municipal policy in question is itself unconstitutional. *See* 489 U.S. at 387, 109 S.Ct. 1197. A municipal policy that causes constitutional violations can be the basis for section 1983 liability. Furthermore, however, the Court held that "the inadequacy of police training may serve as the basis for section 1983 liability *only* where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police came into contact." *Id.* at 388, 109 S.Ct. 1197 (emphases added). The Court declared: "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a policy as defined by our prior cases – can a city be liable for such a failure under section 1983." *Id.* at 389, 109 S.Ct. 1197.

The Court indicated at least two types of situations that would justify a conclusion of deliberate indifference in the failure to train police officers. One is failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction. For example, the Court indicated that lack of instruction in the use of firearms or in the use of deadly force could constitute "deliberate indifference." *Id.* at 390, 109 S.Ct. 1197. A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers.

In granting the City of Toledo's Motion for Summary Judgment, the district court in the instant matter held that the plaintiffs presented no evidence upon which a reasonable jury could find that the City had maintained some policy or custom allowing unlawful dwelling entry or the use of excessive physical force during arrest. We agree. First, beyond mere allegation, the plaintiffs offer no evidence to show that the City of Toledo failed to adequately train Shaner and/or Goodlet regarding the law of search and seizure and the use of force in securing an arrest. Second, the plaintiffs have produced no evidence indicating that the City either on this occasion or in the past failed to investigate and discipline the use of excessive force by its police personnel where such discipline was justified. Plaintiffs contend that the appropriate standard by which to judge their pleadings was set forth by the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). In *Leatherman*, the Supreme Court addressed the question whether a federal

court may apply a heightened pleading standard more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure in civil rights cases alleging municipal liability under section 1983. In reviewing a lower court decision granting a motion to dismiss – not, as in the instant matter, a motion for summary judgment – the Court answered that question in the negative. *See id.* at 168, 113 S.Ct. 1160. The Court stated:

> The phenomenon of litigation against municipal corporations based on claimed constitutional violations by their employees dates from our decision in *Monell*, where we for the first time construed § 1983 to allow such municipal liability. Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.

Id. at 168, 113 S.Ct. 1160. However, the Court concluded: "In the absence of such an amendment, federal courts and litigants *must rely on summary judgment* and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-69, 113 S.Ct. 1160 (emphasis added). In the instant matter, the district court, based on its careful review of the pleadings and evidence, properly did precisely that. Accordingly, its judgment granting the City's Motion for Summary Judgment is affirmed.

II. *Relation Back Under Federal Rule of Civil Procedure 15(c).*

When the instant matter was first filed in state court, Plaintiffs, asserting claims of assault, battery, false arrest/imprisonment and the deprivation of their constitutional rights under section 1983, named as defendants only Officers Shaner and Goodlet. The capacity in which they were sued under section 1983 was not specified. Likewise, their First Amended Complaint did not specify whether the officers were being sued under federal law in their individual or official capacities. By contrast, however, plaintiffs' Second Amended Complaint, filed pursuant to the invitation of the lower court, explicitly named Shaner and Goodlet in their individual capacities, alleging that they illegally entered and searched the plaintiffs' residence and that they searched Mr. Brown without probable cause and through the use of excessive physical force. However, the district court subsequently granted defendants' Rule 12(b)(6) Motion to Dismiss on the ground that the officers were not named as individual capacity defendants until March 18, 1997, after the applicable two-year statute of limitations had expired, as the incident in question occurred on March 11, 1995. We believe the district court erred and that the Second Amended Complaint relates back to April 10, 1996, the date of the original pleading, under Rules 15(c)(2) and 15(c)(3) of the Federal Rules of Civil Procedure.

Rule 15(c), as amended in December 1991, provides, in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, *or*
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, *or*
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided for by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c) (emphases added). Note that each of the conjunctions connecting the three parts of Rule 15(c) is "or," not "and". The rule is based on the notion that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading. Thus, the rule states that amendments meeting this standard relate back to the date of the initial pleading.

The district court, acknowledging that the claims asserted in the amended pleading arose out of the conduct set forth in the original complaint, see JA 154, concluded that the naming of the defendants in their individual capacity in the amended complaint constituted a change in the parties, thus requiring compliance with Rule 15(c)(3), which the district court found to be lacking. While we do not necessarily agree with the district court that identifying the defendants in their "individual" capacities in the amended complaint constitutes a change in parties, we need not decide that issue in this case because even if plaintiff's amended complaint were deemed to assert a change in parties, we are satisfied that the requirements of 15(c)(3) have been met.

In *Lovelace v. O'Hara*, 985 F.2d 847 (6th Cir.1993), this Court considered the case of plaintiff Bonnie Lovelace, who filed a section 1983 action against Officer Lark O'Hara of the Pendleton County (Kentucky) Sheriff's Department, alleging violations of her Fourth, Fifth, and Fourteenth Amendment rights. The original complaint against O'Hara stated:

> At all times referenced herein, the defendant was employed by the Pendleton County Sheriff's Department acting within the scope and course of his employment therein; not as an individual, but rather under the color and pretense of the title of his office; under the authority of his office as a police officer; clearly within the expressed and implied powers of his capacity.

Id. at 849.

The district court treated the complaint as being against O'Hara in his official capacity and granted summary judgment to the Sheriff's Department. However, the court also granted Mrs. Lovelace leave to file an amended complaint naming O'Hara in his individual capacity without prejudice to any motion by the defendant to dismiss the amended complaint on the grounds of qualified immunity or the statute of limitations. The district court subsequently granted Mrs. Lovelace's motion to amend the complaint despite the running of the one-year statute of limitations, holding that the amended complaint related back to the original complaint under Rule 15(c) because the language of the original complaint was broad enough to give O'Hara notice that he was being sued in his individual capacity. However, the district court then considered and granted O'Hara's motion for summary judgment on the ground of qualified immunity.

On appeal, this Court considered the relation back question only under Rule 15(c)(3), not under subsection (c)(2) as providing an independent basis for applying the relation back doctrine. With respect to the notice question under subsection (c)(3), the Court stated that it was

> not convinced that O'Hara had such notice of the suit during the 120 days following the filing of the original complaint that his defense will not now be prejudiced. O'Hara does not contend that he did not have general knowledge of the lawsuit. However, he argues that the first notice he had that he was being sued in his individual capacity was when Mrs. Lovelace filed her amended complaint. This occurred several months after the 120 days allowed for service of

> the summons and complaint. Suit in his individual capacity exposed O'Hara to the possibility of having to pay damages from his personal assets. He argues that he has been prejudiced because if he had known that he was being sued in his individual capacity, he may have retained independent counsel or participated more fully in the defense.

985 F.2d at 850. This Court agreed that O'Hara's argument had merit. *See id.*

Lovelace does not control this case. First, the Court did not consider the complaint independently under (c)(2), but seems to have assumed without comment that (c)(2) was inapplicable in this case as a basis for relation back. The Court's silence regarding the availability of (c)(2) leaves open for this Court to decide whether (c)(2) affords an independent basis for relation back. Second, even if we were to focus on (c)(3), *Lovelace* is distinguishable because it was not "apparent" in *Lovelace* that O'Hara knew or should have known of a "mistake" in the identity of the party set forth in the pleadings. In finding that O'Hara had a right to believe he was being sued in his official, and not his individual, capacity, we stated:

> Here the original complaint contained a statement that O'Hara acted "not as an individual" but "clearly within the expressed and applied powers of his official capacity." From this statement, it seems clear that Mrs. Lovelace intended to hold the state responsible for O'Hara's actions. O'Hara had no reason to believe that he would be held personally liable or that his personal assets were at stake.

Id. at 850-51.

In the instant matter, by contrast, plaintiffs' Original Complaint did not speak in such unequivocal terms; indeed, while it named both individual defendants, it did not state the capacity in which they were being sued, which oversight was first corrected in the Second Amended Complaint. All of the defendants' wrongdoing related to their personal conduct. *Indeed, defendants' counsel acknowledged at oral argument that it was clear from a reading of the complaint that these defendants could not be held liable in their official capacity.* We therefore find that plaintiffs' failure to add the word "individual" to his original complaint was a simple "mistake" and that both defendants "knew or should have known" that but for this omission concerning the capacity in which they were being sued, the action would have been brought against them in their "individual" capacity. Both Shaner and Goodlet knew that they were being sued under section 1983 as early as April 10, 1996, when plaintiffs filed their original Complaint in state court; to wit, they were the only defendants named in that pleading. Even if the specific capacity in which they were being sued was not clear until later, this was not a case where that temporary omission could have led defendants to believe that they themselves could not be liable. Both men "received such notice of the institution of the action that" they were not "prejudiced in maintaining a defense on the merits." Fed.R.Civ.P. 15(c)(3). We therefore conclude that the Plaintiffs' Second Amended Complaint relates back to the date of the filing of the Original Complaint under both

Rule 15(c)(2) and 15(c)(3) of the Federal Rules of Civil Procedure.[1]

The judgment of the district court granting the Officers' Motion to Dismiss is therefore reversed.

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[1] Subsection (c)(3) of Rule 15 incorporates subsection (c)(2), which provides that an amended pleading alleging a new or different claim or defense will not relate back unless it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Fed.R.Civ.P. 15(c)(2). In the instant matter, there is no question that the original and amended complaints clearly involve the same conduct. With respect to the defendants, the only difference between the two pleadings is the capacity in which they were named. Relation back under Rule 15(c)(2) thus also applies.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4406

JEFFERY BROWN; LYNETTE BROWN; KEVIN JOHNSON; KEITH JOHNSON, CRYSTAL REID, by and through their mother and next friend Lynette Brown,
Plaintiffs - Appellants,

v.

WILLIAM SHANER; WILLIAM GOODLET; CITY OF TOLEDO,
Defendants - Appellees.

Before: MERRITT and MOORE, Circuit Judges; DUGGAN, District Judge.

JUDGMENT

(Filed Apr. 15, 1999)

On Appeal from the United States District Court for the Northern District of Ohio at Toledo

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting the motion by defendant City of Toledo for Summary Judgment is AFFIRMED. IT IS FURTHER ORDERED that judgment granting defendants William Shaner and William Goodlet's Motion to Dismiss is REVERSED.

ENTERED BY
ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeffery Brown,
et al.,

Plaintiffs

vs.

William Shaner, et al.,
Defendants

Case No. 3:96-CV-7302

OPINION AND ORDER

(Filed 97 Jan. 24)

POTTER, J.:

This matter is before the Court on defendants' oral motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and plaintiffs' opposition.[1] The Court heard oral argument on the motion on January 17, 1997. Plaintiffs have brought this action under 42 U.S.C. § 1983 alleging that defendants deprived them of their constitutional rights while acting under color of state law. The claims stem from an incident occurring 3/11/95 in which defendants William Shaner and William Goodlet of the Toledo Police Department went to plaintiffs' residence to arrest plaintiff Jeffery Brown pursuant to six outstanding warrants. Plaintiffs allege that in making the arrest, defendants violated their Fourth Amendment protections against unreasonable searches and seizures.

In *Allard v. Weitzman*, 991 F.2d 1236 (6th Cir. 1993), the Sixth Circuit sets forth the standard for considering a Rule 12(b)(6) motion:

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[1] Defendants' motion was presented by oral motion, and plaintiffs' response was filed as "Pretrial Memorandum" on January 21, 1997.

> [The] Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867, 111 S. Ct. 182, 112 L. Ed.2d 145 (1990). A complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L. Ed.2d 80 (1957)). A judge may not grant a Fed.R.Civ.P. 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. *Id.* While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). "In practice, 'a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.' " *Id.* (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)).

In support of their motion, defendants assert that: 1) plaintiffs' complaint does not name defendants William Shaner and William Goodlet in their individual capacity and, as such, the action is essentially an official capacity suit against the City of Toledo; and 2) plaintiffs have failed to allege that Toledo has a policy or custom which resulted in a violation of their constitutional rights.

Turning to defendants' first argument, the Court finds that plaintiffs' complaint does not name officers

William Shaner and William Goodlet in their individual capacity. Under Fed. R. Civ. P. 8(a), the minimum standard for the sufficiency of a complaint is "a short and plain statement of the claim showing that the pleader is entitled to relief. . . . " The purpose of the rule is to "give fair notice of the claim being asserted so as to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata is applicable." *Brown v. Califano*, 75 F.R.D. 497, 498 (D.C.D.C. 1977). The rule also serves to "sharpen the issues to be litigated and to confine discovery and the presentation of evidence at trial within reasonable bounds." *Id.*, (*citing Prezzi v. Berzak*, 57 F.R.D. 149, 151 (S.D.N.Y. 1972)).

The Sixth Circuit Court of Appeals has recognized the importance of giving defendants notice of the capacity in which they are being sued. In *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989), the court stated:

> [T]he face of a complaint must indicate whether a plaintiff seeks to recover damages from defendants directly, or to hold the state responsible for the conduct of its employees. Although modern pleading is less rigid than in an earlier day, we have not let down all pleading barriers. It is not too much to ask that if a person or entity is to be subject to suit, the person or entity should be properly named and clearly notified of the potential for payment of damages individually.

Id. at 593 (citations omitted); *Lovelace v. O'Hara*, 985 F.2d 847, 850 (6th Cir. 1993).

In response to defendants' argument, plaintiffs contend that the face of the complaint provided sufficient

notice that William Shaner and William Goodlet are defendants in their individual capacities. Plaintiffs seem to rely on the apparent lack of specificity in the complaint and argue that it is apparent that the City of Toledo is not the sole defendant in interest. The argument fails, however, considering that the Sixth Circuit has stated its position that "trial and appellate courts should not have to guess at the nature of the claim asserted." *Wells*, 891 F.2d at 594. Moreover, the court noted it is "certainly reasonable" that all plaintiffs alert party defendants that they may be individually responsible in damages. *Id.* Plaintiffs' amended complaint does not specifically make reference to capacity; and, therefore, it is ambiguous at best as to whether defendants have been sued in their individual or official capacities. Consequently, the Court finds that defendants William Shaner and William Goodlet have not been named in their individual capacity. Instead, defendants Shaner and Goodlet have been sued solely in an official capacity. *See Id.* at 594; *Sanderfer v. Nichols*, 62 F.3d 151, 152 at n.1 (6th Cir. 1995) (when the complaint in a § 1983 action does not specify that a defendant is sued in her individual capacity, we have held that such a defendant has been sued in her official capacity only).

Based on the foregoing, plaintiffs' remaining cause of action is essentially a suit against the City of Toledo. Although plaintiffs' complaint has also named Officers Shaner and Goodlet, a suit against individuals in their official capacity is the equivalent of a suit against the governmental entity. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994).

Turning now to defendants' second argument, defendants contend that plaintiffs have failed to plead facts showing the existence of an essential element of their claim. Specifically, defendants argue that plaintiffs' remaining claim should be dismissed because they have failed to allege that Toledo has a policy or custom which resulted in the violation of their constitutional rights.

In order to avoid dismissal under Fed. R. Civ. P. 12(b)(6), a complaint must include "either direct or inferential allegations respecting all the material elements" of the claim for which they seek recovery. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984). Although a plaintiff need not state precisely each element of the claim, the complaint must contain "minimal factual allegations on those material elements that must be proved." *Huddleston v. Lumbermans Mut. Cas. Co.*, 942 F. Supp. 504 (D.Kan. 1996).

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court established that a local government will be liable under § 1983 only if the plaintiff can show that the alleged constitutional violation resulted from an official policy or custom of the local government. Citing *Monell*, defendants argue that plaintiffs' complaint must be dismissed based on plaintiffs' failure to allege a custom, policy, or practice established by the City of Toledo which was followed by Officers Shaner and Goodlet and which caused them to violate plaintiffs' constitutional rights. In opposing the motion, plaintiffs argue that such heightened pleading requirements were condemned by the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and that plaintiffs'

complaint satisfies the federal standards set forth for notice pleading.

After a thorough review of the applicable law, the Court finds that in order to state a claim against a municipality under § 1983, plaintiffs must set forth facts showing the existence of an offending policy or custom. *See Austin v. City of East Grand Rapids*, 685 F. Supp. 1396, 1407 (W.D.Mich. 1988); *Hines v. Sheahan*, 845 F. Supp. 1265 (N.D.Ill. 1994); *Ellis v. Philadelphia Police Dept.*, No. Civ. A.96-6403, 1996 WL 683868 (E.D.Pa. Nov. 25, 1996); *Sheppard v. Fairman*, No. 94-3588, 1995 WL 481449 (7th Cir. Aug. 10, 1995). Although the Supreme Court in *Leatherman* eliminated the need to plead "with particularity" the facts upon which a claim is based, *Leatherman* did not abolish the need to allege policy or custom altogether. *Leatherman*, 507 U.S. at 168. This notion was recognized in *Hines v. Sheahan*, 845 F. Supp. 1265, 1268 (N.D.Ill. 1994), wherein the Court stated:

> The Supreme Court in *Leatherman v. Tarrant County Narcotics Unit*, recently rejected a heightened pleading standard for complaints alleging liability of governmental entities under § 1983. Thus, plaintiff is not required to plead with particularity the facts upon which he bases his claim of official policy or custom resulting in constitutional deprivation, but need only provide a " 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." However, plaintiff's complaint lacks any allegation whatsoever of official custom or policy, and thus fails to meet even this liberal pleading standard. (citations omitted).

Therefore, finding no references in the complaint to policy or custom, the Court finds that plaintiffs' complaint fails to adequately state a claim against the City of Toledo pursuant to 42 U.S.C. § 1983.

Ordinarily, the remedy for noncompliance with Fed. R. Civ. P. 8(a) is dismissal with leave to amend. *Brown v. Califano*, 75 F.R.D. 497 (D.C.D.C. 1977). Although defendants object to allowing plaintiffs leave to amend at a date so far into the litigation, the Court finds the measure is warranted under the circumstances.

The Court further notes that motions pursuant to Fed. R. Civ. P. 12(b)(6) should ordinarily be filed promptly to prevent the costs associated with undue delay.[2] Although not mandated under all circumstances by the Federal Rules, prompt filing helps to narrow the issues and extinguish frivolous claims at an early point in the litigation. In addition, the Court finds it particularly important to recognize that a motion filing deadline of October 1, 1996 was set at the case management conference held July 15, 1996. Although case management dates are subject to change by the Court for good cause, they are not to be disregarded.

As an additional matter, the Court recognizes that plaintiffs' counsel has represented to the Court that he has recently been unable to contact the plaintiffs. To prevent further litigation of a matter for which plaintiffs may no longer wish to seek recovery, the Court will

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[2] In the present case, for example, the cost of impaneling the jury, on the day defendants' motion was made, may have been needlessly incurred.

impose the following condition: prior to filing the second amended complaint, an adult plaintiff must sign the pleading. If plaintiffs do not file a second amended complaint by March 21, 1997, the Court will enter final judgment dismissing the action.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion to dismiss be, and hereby is, GRANTED; and it is

FURTHER ORDERED that plaintiffs' are granted until 3/21/97 to file an amended complaint which bears the signature of an adult plaintiff.

/s/ John W. Potter
Sr. United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeffery Brown,
et al.,

Plaintiffs

vs.

William Shaner, et al.,
Defendants

Case No. 3:96CV7302

OPINION AND ORDER

(Filed 97 Jun. 23)

POTTER, J.:

This action is before the Court on defendants William Shaner's and William Goodlet's motion to dismiss, plaintiffs' opposition and supplemental memorandum, and defendants' reply. Also before the Court is the City of Toledo's (City) motion for summary judgment and plaintiffs' opposition.

On April 10, 1996, plaintiffs filed their original complaint in state court alleging a violation of the Fourth Amendment right to be free from unreasonable searches and seizures and several state claims. The complaint named police officers Shaner and Goodlet as defendants but did not specify whether they were named in their individual or official capacities. On April 15, 1996, plaintiffs filed their first amended complaint naming the City of Toledo as an additional defendant and adding an additional state claim for negligent supervision of officers Shaner and Goodlet. All of the state claims were subsequently either withdrawn by plaintiffs or dismissed by stipulation of the parties.

On May 9, 1996, this action was removed from state court. In their removal statement filed May 21, 1996, defendants stated that "Shaner and Goodlet are not named in this action in their individual capacity and, therefore, this action is deemed to be one alleged against only the City of Toledo." On January 17, 1997, the day trial was to begin and after the jury had been impanelled, defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court heard oral arguments on the motion, and plaintiffs requested leave to amend their complaint. By order dated January 24, 1997, the Court found that defendants Shaner and Goodlet were sued solely in their official capacity and that plaintiffs' complaint failed to allege that the constitutional violation resulted from an official policy or custom of the City. The Court, therefore, granted defendants' motion. However, the Court granted plaintiffs until March 21, 1997 to file a second amended complaint.

On March 18, plaintiffs filed their amended complaint, alleging that the City, as its policy and/or custom, failed to adequately train officers Shaner and Goodlet regarding the law of search and seizure and as to the use of force in securing an arrest. Second Amended Complaint, ¶18. In that complaint, plaintiffs also named Shaner and Goodlet in their individual capacities. Defendants Shaner and Goodlet now move to dismiss this action as being barred by the applicable statute of limitations.

In Ohio, the two-year statute of limitations for personal injury actions has been held to apply to claims brought pursuant to 42 U.S.C. § 1983. *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989); *Hull v. Cuyahoga*

Valley Bd. of Educ., 926 F.2d 505, 510 (6th Cir. 1991). The incident which serves as the basis for plaintiffs' second amended complaint occurred on March 11, 1995. The second amended complaint, naming officers Shaner and Goodlet for the first time in their individual capacities, was not filed until March 18, 1997. Thus, unless the claims against the officers are determined to relate back to the date of filing of plaintiffs' earlier complaint, plaintiffs are barred from pursuing them.

Pursuant to Federal Rule of Civil Procedure 15(c), an amendment relates back to the date of the original pleading when:

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Plaintiffs contend that because Ohio law provides the statute of limitations in a § 1983 action, Rule 15(c)(1) requires the Court to apply Ohio's relation back rule. Ohio Civ. R. P. 15(c) tracks the federal rule with the exception of the timing within which the party to be brought into the suit must receive the requisite notice. While the federal rule requires such notice to have been received within 120 days after the filing of the complaint, the period provided by Rule 4(m) for service, the Ohio rule requires the notice to have been received "within the period provided by law for commencing the action against him." Ohio Civ. R. P. 15(C). For relation back purposes, the language "within the period provided by law for commencing the action" in Ohio's rule includes the one year time period for service allowed by Ohio Civil Rule of Procedure 3(A). *Cecil v. Cottrill*, 67 Ohio St. 3d 367, 371 (1993). Plaintiffs further contend that defendants received constructive notice of an individual capacity suit on January 17, 1997 when this Court heard oral argument on the City's motion to dismiss and plaintiffs requested leave to amend their complaint. Because January 17 was within one year from the date plaintiffs' filed their original complaint, they argue that sufficient notice was given for relation back purposes.

Defendants contend that the Court must apply Fed. R. Civ. P. 15(c)(3) in determining whether the second amended complaint relates back to the earlier filing. While they concede that the claims asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original complaint, defendants argue that neither the notice without prejudice nor the mistaken identity requirements have been met.

Because the Court agrees that plaintiffs have not met the requirements of notice without prejudice and mistaken identity which are required under both the Ohio and federal rules, the Court need not determine which rule should be applied. Although formal notice is not required in order to trigger the relation back of an amended pleading under Rule 15(c), *Simpson v. City of Maple Heights*, 720 F. Supp. 1303 (N.D. Ohio 1988), plaintiffs' request to file a second amended complaint cannot be equated with notice of an intention to name the defendant officers in their individual capacity. The City's motion to dismiss was granted on the basis that no official policy or custom was alleged in the complaint. Thus, plaintiffs' request to amend their complaint could have been construed simply as an intention to allege an offending policy or custom of the City, which they subsequently did allege in the second amended complaint.

Furthermore, the question of whether informal notice is sufficient to satisfy Rule 15(c) depends largely on whether the new party would be prejudiced. The Sixth Circuit has recognized that "an amendment in a defendant's capacity in a lawsuit under 42 U.S.C. § 1983 alters the elements of recovery and defense . . . [and] require[s] major changes in pleading, discovery, trial preparation and selection and location of witnesses to testify at trial." *Lovelace v. O'Hara*, 985 F.2d 847, 850 (6th Cir. 1993). Given the fact that plaintiffs' request to amend their complaint was made after discovery had been completed and on the day trial was to begin, the Court cannot conclude that the defendant officers would not now be prejudiced.

The Court further finds that the final requirement for relation back under Rule 15(c) has not been met. This

requires that the defendant knew or should have known that, but for a mistake in identity, the suit would have been brought against him. Plaintiffs' original complaint clearly alleges that defendants Shaner and Goodlet violated their constitutional rights. Thus, this is not a case in which plaintiffs were unaware of who the officers were that were involved in the incident giving rise to this action. There was no mistake concerning identity. Rather, "plaintiffs' mistake concerned a matter of law — the capacity in which [they] sued [defendants] — rather than a misapprehension of [defendants'] identity." *Lovelace*, 985 F.2d at 851, *quoting Hill v. Shelander*, 924 F.2d 1370, 1382 (7th Cir. 1991) (Coffey, J., dissenting).

The Court has also considered the fact that plaintiffs were, or should have been, aware that their complaint failed to allege an individual capacity suit as early as May 21, 1996. At that time, the City filed its removal statement. That statement correctly indicated that because the defendant officers were not named in their individual capacities, the action was deemed to be one alleged against the City only. Plaintiffs did not amend the complaint until March 18, 1997, after the statute of limitations had run. Given the fact that plaintiffs were put on notice of the deficiency in their complaint and did not even request to amend it before the day trial was to begin, the defendant officers had no reason to believe that, but for a mistake concerning identity, the suit would have been against them in their individual capacities. Thus, the Court finds that the second amended complaint fails to meet the criteria for relation back under both the Ohio and the federal rule.

Nevertheless, plaintiffs argue that, in light of this Court's January 24, 1997 order granting leave until March 21, 1997 to file an amended complaint, their second amended complaint should be found to relate back. However, relation back must be determined by applying the requirements set forth in the civil rules, which the Court has already found have not been met. Insofar as plaintiffs are contending that the statute of limitations should be equitably tolled, the Court does not find such tolling appropriate. Even in cases in which equitable tolling has been applied where plaintiffs reasonably relied on a court order, the following factors were considered pertinent to that application in the context of an employment discrimination action: (1) lack of actual or constructive knowledge of the filing requirement; (2) diligence in pursuing one's claims; (3) absence of prejudice to the defendant; and (4) plaintiffs' reasonableness in relying on the court's order. *Andrews v. Orr*, 851 F.2d 146, 151-52 (6th Cir. 1988).

In the case sub judice, plaintiffs do not claim lack of knowledge of the proper filing requirement. The Court has already found that prejudice exists due to the differences in pleading, discovery, and trial preparation in an official capacity suit as compared to an individual capacity suit. In addition, as indicated earlier in this opinion, plaintiffs did not diligently pursue their claim against the officers in their individual capacity, having waited nearly ten months after being made aware that the complaint alleged only an official capacity suit to amend the complaint. The Court further finds plaintiffs' reliance on the January 24 order unreasonable. Having reviewed the transcript of the oral argument on the motion to dismiss, the Court notes that it alerted plaintiff that the statute of

limitations was an issue. If plaintiffs intended to amend their complaint to allege not only a proper claim against the City, but also against the officers individually, they had ample time to do so within the limitation period. Accordingly, defendants' motion to dismiss will be granted.

Next, the Court considers the City's motion for summary judgment. The standards for reviewing a motion for summary judgment are well settled.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986). . . . In reviewing a motion for summary judgment, however, all inferences " 'must be viewed in the light most favorable to the party opposing the motion.' " *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

> *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision. If the [nonmoving party's] theory is

> . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2083 (1992) (footnote omitted).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." . . . Rule 56(e) therefore requires

> the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324.

Plaintiffs allege in their second amended complaint that the defendant officers illegally entered and searched their residence, unlawfully arrested plaintiff Jeffrey Brown, and used unnecessary force in making the arrest. They further allege that the City, as its policy or custom, failed to adequately train the officers regarding the law of search and seizure and as to the use of force in securing an arrest and subsequently ratified the officers' conduct.

A municipality cannot be held liable under § 1983 on a respondent superior theory. In order to prevail on a claim against a municipality, plaintiffs must show that the alleged constitutional violations resulted from either an official policy established by an authorized municipal policy-maker or a custom that was acquiesced in or tolerated by municipal policy-makers as a result of deliberate indifference to the rights of its citizens. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-91 (1978); *Berry v. City of Detroit*, 25 F.3d 1342, 1345-1355 (6th Cir. 1994). Such a policy or custom may be inferred by evidence of the municipality's widespread failure to properly train its officers in appropriate, germane procedures or a similarly widespread failure to discipline its officers for transgressions. *See Id.*

In support of its motion for summary judgment, the City offers the affidavit of Gerald T. Galvin, Chief of

Police for the City, and written policies of the Department. This evidence indicates that no policy or custom of the City exists whereby officers are permitted to engage in the constitutional violations alleged in plaintiffs' complaint.

Plaintiffs, for their part, offer the report of the disposition of plaintiff Jeffrey Brown's complaint to the Internal Affairs Unit of the City's police department. That report indicates that Brown's complaint was investigated and determined to be unfounded. Plaintiffs also offer the affidavit of Jeffrey Brown wherein he states that plaintiffs were subjected to constitutional violations, that he filed a complaint with the Internal Affairs Unit, that his complaint was determined to be unfounded, and that the defendant officers were not disciplined.

On this evidence, the Court finds that a reasonable juror could not find that the City has an officially sanctioned policy or, in the alternative, an acquiesced-in custom of allowing its police officers to make unlawful entries into the dwellings of private citizens. Similarly, there is no evidence of a policy or acquiesced-in custom of allowing the use of excessive force. Accordingly, the City's motion for summary judgment will be granted.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants Shaner's and Goodlet's motion to dismiss be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the City's motion for summary judgment be, and hereby is, GRANTED.

/s/ John W Potter
Sr. United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Jeffrey Brown, et al.,
Plaintiffs
vs.
William Shaner, et al.,
Defendants

Case No. 3:96CV7302

MEMORANDUM AND ORDER

(Filed Oct. 17, 1997)

POTTER, J.:

This action is before the Court on plaintiffs' motion for a new trial pursuant to Fed. R. Civ. P. 59 and defendants' opposition.

In their amended complaint, plaintiffs allege that defendant police officers William Shaner and William Goodlet and the City of Toledo (the City) deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. Trial in this matter was scheduled to begin on January 17, 1997. On that date, after impaneling the jury but before opening statements were made, defendants orally moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6). The City argued that, since Shaner and Goodlet were named in their official capacities only and since plaintiffs failed to allege a policy or custom of the City which resulted in the alleged constitutional violations, plaintiffs had failed to state a claim upon which relief could be granted. After granting plaintiffs the opportunity to respond in writing, this Court granted defendants' motion to dismiss. Although defendants objected to allowing plaintiffs leave to amend, the Court

recognized that, had defendants filed a written motion before the motion filing deadline of October 1, 1996, plaintiffs would have had the opportunity to amend their complaint in a more timely fashion. Therefore, on January 24, 1997, the Court granted plaintiffs until March 21, 1997 to file a second amended complaint.

On March 18, 1997, plaintiffs filed their second amended complaint naming Shaner and Goodlet in their individual capacities. In addition, the City was named and was alleged to have ratified constitutional violations through a policy and/or custom of inadequate police officer training. On April 8, 1997, defendants Shaner and Goodlet filed a motion to dismiss the second amended complaint; and on May 20, 1997, the City filed its motion for summary judgment. On June 23, 1997, this Court granted both of the motions and dismissed the case.

In their motion for a new trial, plaintiffs request that this Court vacate any ruling on motions presented by defendants after the original motion filing deadline of October 1, 1996 and order a new trial. In support of this request, plaintiffs contend that they were "blindsided" by the City's oral motion to dismiss on January 17 and were prejudiced, in an unspecified manner, as a result of the Court entertaining that motion after the expiration of the pretrial motion filing deadline.

Although plaintiffs caption their motion as a motion for a new trial pursuant to Fed. R. Civ. P. 59, the Court notes that, while the jury was impaneled, the trial itself had not commenced. This case was subsequently dismissed pursuant to a motion to dismiss and a motion for

summary judgment. Thus, a motion for a new trial pursuant to Rule 59(a) at this juncture is technically improper. *See Harris v. Refiners Transport & Terminal Corp.*, 129 L.R.R.M. (BNA) 2455 (Sept. 5, 1986 N.D. Ohio). However, a district court may reconsider its decision on a motion to dismiss or summary judgment motion pursuant to Rule 59(e). The Court will, therefore, construe plaintiffs' motion as a motion to alter or amend judgment pursuant to Rule 59(e).

Courts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not previously available; or (3) to correct a clear error of law or prevent manifest injustice. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993); *see also Javetz v. Bd. Of Control, Grand Valley State Univ.*, 903 F. Supp. 1181, 1190 (W.D. Mich. 1995); *Weyerhaeuser Corp. v. Koppers Co., Inc.*, 771 F. Supp. 1406, 1419 (D. Md. 1991); *Estate of Pidcock v. Sunnyland America, Inc.*, 726 F. Supp. 1322, 1333 (S.D. Ga. 1989). Plaintiffs assert neither of the first two grounds. Rather, plaintiffs apparently argue that the Court should vacate its earlier decisions in order to prevent a manifest injustice; namely, an unspecified prejudice incurred by plaintiffs as a result of defendants' misconduct, that is, orally moving to dismiss on January 14. The Court finds this argument is without merit.

The Court finds that plaintiffs were neither prejudiced by the Court entertaining defendants' oral motion nor were they blindsided by said oral motion. As indicated in this Court's order of June 23, 1997, plaintiffs were, or should have been, aware of certain deficiencies

in their complaint as early as May 21, 1996. They, nevertheless, took no steps to amend the complaint until after the motion to dismiss was made. In any event, any possible prejudice that plaintiffs could have sustained was cured in that plaintiffs were granted time to respond to the motion in writing and, after the motion was granted, were provided ample time to file an amended complaint.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion for a new trial be, and hereby is, DENIED.

/s/ John W. Potter
Sr. United States District
Judge

97-4406

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFERY BROWN, ET AL.,	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	(Filed June 7, 1999)
WILLIAM SHANER, ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: MERRITT and MOORE, Circuit Judges; DUGGAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Hon. Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)